

EXHIBIT 1

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6
7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 CHRISTINE DAVID and RODNEY CLURE,
10 individually and on behalf of all others similarly
situated,

11 Plaintiffs,

12 v.

13 BANKERS LIFE AND CASUALTY
14 COMPANY, a foreign corporation,

15 Defendant.

Case No.

DECLARATION OF DANIEL L.
THIEME IN SUPPORT OF
DEFENDANT'S NOTICE OF
REMOVAL

16 I, DANIEL L. THIEME, do hereby declare as follows:

17 1. I am an attorney with Littler Mendelson, P.C. I am the lead counsel in this case
18 for Defendant Bankers Life and Casualty Company ("Bankers" or "Defendant"). I am
19 submitting this declaration in support of Defendant's Notice of Removal. I am over the age of
20 eighteen, have personal knowledge of the facts stated in this declaration, and am competent to
21 testify thereto.

22 2. Attached hereto as Exhibit A is a true and correct copy of the First Amended
23 Class Action Complaint in this action.

24 3. On July 24, 2013, I took the deposition in this case of named Plaintiff Christine
25 David. Ms. David testified that she would be teaching English in China for two years starting in
26

1 August of 2013, but also would be returning to Seattle from time to time. A true and correct
2 copy of page 34 of her deposition is attached hereto as Exhibit B.

3 4. The King County Superior Court issued Findings of Fact, Conclusions of Law,
4 and Order Regarding Plaintiffs' Motion for Class Certification in this action on January 22, 2014
5 ("Findings of Fact"). A true and correct copy of the Findings of Fact is attached hereto as
6 Exhibit C. In Conclusion of Law No. 6 on page 6, the Court found that there are more than
7 1,000 Agents in the class.

8 5. Bankers' Interrogatory No. 2 in its third set of discovery in this action asked the
9 Plaintiffs to "[s]tate the amount of damages sought by the Class in this case, and describe in
10 detail how the amount is calculated." Plaintiff first answered this Interrogatory on March 17,
11 2014, indicating that plaintiff was in the process of calculating the damages. On May 19, 2014,
12 Plaintiffs supplemented their answer to Interrogatory No. 2, stating that the total class damages
13 for the time period from June 16, 2008 through December 31, 2011 are estimated at \$16,928,996.
14 A true and correct copy of Plaintiffs' May 19, 2014 supplemental response (which also includes
15 the Interrogatory and Plaintiff's first response) is attached hereto as Exhibit D.

16 I declare under penalty of perjury that the foregoing is true and correct.

17 Executed this 22nd day of May 2014, at Seattle, Washington.

18
19 s/ Daniel L. Thieme
DANIEL L. THIEME

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Suite 3200, Seattle, Washington 98101.3122. I certify that on May 22, 2014, I filed the foregoing document with the Clerk of the Court using the CM/ECF System.

I further certify that I served a true copy of the foregoing document in the manner indicated on the person(s) set forth below:

- ☐ by emailing a true copy of the same to the email addresses of the person(s) set forth below.
- ☐ by placing a true copy of the same for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.
- ☒ by causing a copy of the same to be hand-delivered to the person(s) at the address(es) set forth below.

Martin S. Garfinkel, WSBA # 20714
garfinkel@sgb-law.com
Adam J. Berger, WSBA #20787
berger@sgb-law.com
Lindsay L. Halm, WSBA #37141
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SCHROETER GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Tel: (206) 622-8000
Fax: (206) 682-2305

ATTORNEYS FOR PLAINTIFF

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on May 22, 2014, at Seattle, Washington.

s/Sally Swearingen
sswearingen@littler.com

EXHIBIT A

The Honorable Theresa Doyle
Trial Date: June 16, 2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID and RODNEY
CLURE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BANKERS LIFE AND CASUALTY
COMPANY, a foreign corporation; and
ALBERT HAWKS, an individual,

Defendants.

No. 11-2-21154-1 SEA

FIRST AMENDED CLASS ACTION
COMPLAINT

I. INTRODUCTORY STATEMENT

This is a class action brought under the Washington Minimum Wage Act ("MWA"), Ch. 49.46 RCW, on behalf of all persons currently or formerly employed as Agents by Defendant Bankers Life and Casualty Company in the State of Washington at any time from three years prior to the filing of this Complaint to the present and hereafter. Plaintiffs allege that they and other Agents were misclassified as independent contractors by Defendants and were thereby denied proper compensation, including minimum wages and overtime pay, required under the MWA.

II. JURISDICTION AND VENUE

1
2 1. Jurisdiction and venue are proper in this Court under RCW 4.12.020 as all or
3 some of the acts and omissions giving rise to this case took place in King County,
4 Washington.

III. PARTIES

5
6 2. Plaintiff Christine David is a resident of Seattle, Washington and was
7 formerly employed by Bankers Life and Casualty Company as an Agent in Washington
8 State.
9

10 3. Plaintiff Rodney Clure is a resident of Bellevue, Washington and was
11 formerly employed by Bankers Life and Casualty Company as an Agent in Washington
12 State.
13

14 4. Defendant Bankers Life and Casualty Company ("Bankers") is a foreign
15 corporation with a principal place of business in Chicago, Illinois. At all times material
16 hereto, Bankers conducted business in King County and the State of Washington.

17 5. Defendant Albert Hawks is a resident of Washington and, at all times material
18 hereto, is and was the branch manager and regional manager for Bankers in Washington
19 State.
20

21 6. Bankers and Albert Hawks are and were employers within the meaning of the
22 MWA.

IV. FACTUAL ALLEGATIONS

23
24 7. Plaintiff and other persons hired by Defendants as Agents were engaged to
25 sell annuities and other Bankers insurance products in Washington State. Bankers' insurance
26 products are primarily targeted at senior citizens.

1 8. Defendants classified Plaintiffs and other Agents in Washington State as
2 independent contractors rather than as employees.

3 9. Plaintiffs and other Agents were paid on a commission basis.

4 10. The Agents were economically dependent upon Bankers in all critical
5 respects. Bankers controlled the manner and means of the work performed by the Agents;
6 the Agents could not increase their profits by their managerial skill; any investment made by
7 Agents in equipment or material was minimal; Bankers did not require any experience in the
8 industry or as a salesperson and the level of skill required for the work was consistent with an
9 employment relationship; Agents were given reason to expect a longstanding relationship
10 with Bankers Life; and the work of the Agents -- selling of insurance products -- was integral
11 to the business model of Bankers Life.
12

13 11. Plaintiff and other Agents routinely worked more than 40 hours per week
14 during the three years prior to the filing of this complaint, but were never paid time and a half
15 overtime wages by Defendants for hours worked in excess of 40 hours per week.
16

17 12. There were workweeks during the three years prior to the filing of this
18 complaint when the compensation paid to Plaintiffs and other Agents was less than the
19 minimum wage per hour set by the Washington Department of Labor and Industries under
20 the MWA.
21

22 13. Defendants' failure to pay overtime compensation or, in some weeks,
23 minimum wages was due to Defendants' misclassification of Plaintiffs and other Agents as
24 independent contractors, when, in fact, they were statutory employees.

25 V. CLASS ALLEGATIONS

26 14. Plaintiffs file this lawsuit pursuant to the MWA and CR 23 on behalf of
themselves and similarly situated individuals employed by Defendants. The class of

1 potential plaintiffs encompassed by this claim includes:

2 All persons hired by Bankers who worked as Agents (or in similar job
3 classifications) during the three years prior to the filing of this lawsuit
4 and thereafter whom Bankers classified as independent contractors.

5 15. The action is properly maintainable under CR 23(a), (b)(2) and (b)(3).

6 16. The class described above is sufficiently numerous such that joinder of all of
7 them is impractical, as required by CR 23(a)(1).

8 17. Pursuant to CR 23(a)(2), there are questions of law and fact common to the
9 class, including, but not limited to: whether class members were misclassified as independent
10 contractors by Defendants; whether class members are subject to the overtime requirements
11 of the MWA; whether Defendants failed to pay class members one and one-half times their
12 regular rate of pay for overtime work; and whether Defendants failed to pay class members
13 minimum wages in any workweeks.

14 18. Pursuant to CR 23(a)(3), Plaintiffs' wage and hour claims are typical of the
15 claims of all class members and of Defendants' anticipated affirmative defenses thereto.

16 19. Plaintiffs will fairly and adequately protect the interests of the class as
17 required by CR 23(a)(4).

18 20. Pursuant to CR 23(b)(2), Defendants have acted on grounds generally
19 applicable to the class members by uniformly misclassifying them as independent
20 contractors, making declaratory relief appropriate with respect to the class as a whole.

21 21. Pursuant to CR 23(b)(3), class certification is appropriate here because
22 questions of law or fact common to members of the class predominate over any questions
23 affecting only individual members and because a class action is superior to other available
24 methods for the fair and efficient adjudication of the controversy.
25
26

VI. CLAIMS FOR RELIEF

A. First Claim - Failure To Pay Overtime Wages In Violation Of the MWA

22. Plaintiffs repeat and reallege the prior allegations of this complaint.

23. Defendants' failure to pay Plaintiffs and the class members one and one-half times their regular rate of pay for hours worked in excess of 40 in their workweeks constitutes a violation of RCW 49.46.130.

24. As a result of Defendants' acts and omissions, Plaintiffs and the class members have been damaged in amounts as will be proven at trial.

B. Second Claim – Failure To Pay Minimum Wages In Violation Of The MWA

25. Plaintiffs repeat and reallege the prior allegations of this complaint.

26. Defendants' failure to pay Plaintiffs and the class members at least the minimum wage per hour for each hour worked in their workweeks constitutes a violation of RCW 49.46.020.

27. As a result of Defendants' acts and omissions, Plaintiffs and the class members have been damaged in amounts as will be proven at trial.

VII. PRAYER FOR RELIEF

28. The total recovery alleged by Plaintiffs in this case, including reasonable attorneys' fees but excluding interest and costs, is less than \$75,000 for the named Plaintiffs individually and \$5,000,000 in the aggregate for Plaintiffs and the class as a whole.

29. Wherefore, Plaintiffs, individually and on behalf of the similarly situated persons, pray for relief as follows:

- a. Certification of this case as a class action pursuant to CR 23 and the MWA;

- b. Damages for lost wages in amounts to be proven at trial;
- c. Attorneys' fees and costs pursuant to RCW 49.46.090 and RCW 49.48.030;
- d. Prejudgment interest; and
- e. Such other and further relief as the Court deems just and proper.

DATED this 28th day of August, 2013.

SCHROETER, GOLDMARK & BENDER



Adam J. Berger, WSBA #20714
Martin S. Garfinkel, WSBA #20787
Lindsay L. Halm, WSBA #37141
Counsel for Plaintiffs

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on August 28, 2013, I caused to be emailed and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this document addressed to counsel of record, as follows:

Daniel L. Thieme
Ryan P. Hammond
Rachelle L. Wills
Littler Mendelson PC
600 University Street, Suite 3200
Seattle, WA 98101

Tyler L. Farmer
Calfo Harrigan Leyh & Eakes LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104

DATED at Seattle, Washington this 28th day of August, 2013.



SHEILA CRONAN
Paralegal

EXHIBIT B

Christine Marie David

July 24, 2013

Page 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID, individually)
and on behalf of all others)
similarly situated,)

Plaintiff,)

vs.)

No. 11-2-21154-1 SEA

BANKERS LIFE AND CASUALTY)
COMPANY, a foreign)
corporation; and ALBERT)
HAWKS, an individual,)

Defendants.)

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION
OF
CHRISTINE MARIE DAVID

Little Mendelson, P.C.
600 University Street, Suite 3200
Seattle, WA 98101-3122

DATE: July 24, 2013

REPORTED BY: Jill L. Cheeseman, RPR CCR 2404

SEATTLE DEPOSITION REPORTERS, LLC

www.seadep.com

206.622.6661 * 800.657.1110

FAX: 206.622.6236

A P P E A R A N C E S

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ALSO PRESENT:

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VIDEOGRAPHER:

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Christine Marie David

July 24, 2013

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1 E X A M I N A T I O N

2 WITNESS MR. THIEME MR. FARMER MR. BERGER

3 CHRISTINE MARIE 6 186 210

4 DAVID 216 241

5

6 E X H I B I T S

7	DESCRIPTION	PAGE
8	1 Resumé Christine M. David	9
9	(DAVID 000446 - 449)	
10	2 Resumé Christine Marie David	10
11	(Confidential BL 01293 - 1297)	
12	3 Agent Contract	38
13	(DAVID 000006 - 33)	
14	4 Declaration Page	39
15	(Confidential BL 00060)	
16	5 Endorsements	40
17	(Confidential BL 00048 - 53)	
18	6 Agent License, Appointment Certificate,	45
19	Insurance Producer License	
20	(DAVID 000486 - 487)	
21	7 Credit Card Authorization dated	50
22	August 31, 2009	
23	(Confidential BL 01269)	
24	8 Hardware and Software Statement dated	51
25	August 31, 2009	
	(Confidential BL 00038)	
	9 Geico Insurance ID Card	52
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	* 11 Form 1040 for 2010	181
	(Confidential DAVID 000557 - 568)	

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Christine Marie David

July 24, 2013

Page 4

1 E X H I B I T S (Continued)

2 DESCRIPTION PAGE

3 * 12 Agent's Compensation Statement 183

As of December 15, 2009

4 (Attorneys Eyes Only BL)

5 * Exhibits 10, 11 and 12 with sealed portion of
6 transcript, pursuant to protective order.

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Christine Marie David

July 24, 2013

Page 5

1 Seattle, Washington, Wednesday, July 24, 2013

2 9:03 a.m.

3 -----

4 VIDEOGRAPHER: Here begins the video
5 deposition of Christine David. This is Tape 1, Volume
6 1, in the matter of David versus Bankers Life in the
7 Superior Court of State of Washington in and for King
8 County, Case Number 11-2-21154-1 SEA.

9 Today's date is Wednesday, July 24, 2013.
10 The time on the video monitor is 9:03 a.m. The
11 videographer today is Bill Takos, video specialist for
12 Seattle Deposition Reporters located in Seattle,
13 Washington. The phone number is 206-622-6661. The
14 court reporter is Jill Cheeseman, also from Seattle
15 Deposition Reporters.

16 Today's deposition is taken on behalf of
17 defendant, taking place at 600 University Street, Suite
18 3200, Seattle, Washington.

19 Counsel and all present, please introduce
20 yourselves and whom you represent.

21 MR. BERGER: Adam Berger from Schroeter
22 Goldmark and Bender on behalf of plaintiff.

23 MR. THIEME: Dan Thieme, Littler Mendelson,
24 on behalf of defendant.

25 MR. HAMMOND: Ryan Hammond, Littler

Christine Marie David

July 24, 2013

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1 on to graduate school and completed that just recently.

2 Q. Congratulations.

3 A. Thank you.

4 Q. What was your undergraduate degree in?

5 A. Political science.

6 Q. And your graduate degree?

7 A. In teaching English as a second language.

8 Q. And I believe I understand that something is
9 taking you away from this country for a period of time;
10 is that right?

11 A. The teaching English as a second language.

12 Q. Where overseas are you going to teach
13 English?

14 A. I'll be teaching at Shantou University in
15 Shantou, Guangdong Province, China.

16 Q. When does that begin?

17 A. That begins August 19.

18 Q. And how long are you currently scheduled to
19 be there teaching English?

20 A. I have a two year contract.

21 Q. Life is uncertain of course; but as you sit
22 here today, do you expect to be over in China for that
23 two year period?

24 A. I expect to be in China for that two year
25 period. I expect to be back in the Seattle area in

Christine Marie David

July 24, 2013

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1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
3) ss.
4 COUNTY OF SNOHOMISH)

5 I, the undersigned Registered Professional
6 Reporter and Washington Certified Court Reporter,
7 hereby certify that the foregoing videotaped deposition
8 upon oral examination of CHRISTINE MARIE DAVID was
9 taken stenographically before me on July 24, 2013, and
10 transcribed under my direction;

11 That the witness was duly sworn by me
12 pursuant to RCW 5.28.010 to testify truthfully; that
13 the transcript of the videotaped deposition is a full,
14 true and correct transcript to the best of my ability;
15 that I am neither attorney for nor a relative or
16 employee of any of the parties to the action or any
17 attorney or counsel employed by the parties hereto nor
18 financially interested in its outcome.

19 IN WITNESS WHEREOF, I have hereunto set my
20 hand this 2nd day of August 2013.
21

22 \S\JILL L. CHEESEMAN

23 _____
24 NCRA Registered Professional Reporter
25 Washington Certified Court Reporter No. 2404
License expires February 23, 2014.

SEATTLE DEPOSITION REPORTERS, LLC

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FAX: 206.622.6236

EXHIBIT C



Honorable Theresa Doyle
Trial Date: June 16, 2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID and RODNEY
CLURE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BANKERS LIFE AND CASUALTY
COMPANY, a foreign corporation; and
ALBERT HAWKS, an individual,

Defendants.

No. 11-2-21154-1 SEA

~~[PROPOSED]~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION

Pursuant to the Court's Memorandum Decision of December 2, 2013, plaintiffs
submit the following proposed findings and conclusions regarding the CR 23 factors in this
case.¹

¹ Citations in the following findings and conclusions are to the Declarations of Rod Clure, Christine David, Anthony Gaynes, Gary Glassburn, David Hendry, Maureen Hoff, Stephanie Huggins, Shawn Layton, Christopher Mitchell, Richard Keppler, Bill Blankenship, Erina Bowie, Nicolas Crowner, Lillian Neil, Daniel Graf, Jacquelynn McCormick, Loren Boles, Stephen Cummings, and George Francisco, all of whom are former agents with Bankers Life. Mr. Cummings and Mr. Layton also filed Second Declarations, which are cited. Exhibit citations are to the exhibits appended to the first and second Declarations of Adam J. Berger. Also cited are the declarations of Bankers managers and agents Charles "Bill" Berryhill, Rich Carter, Lawrence "Loren" Dean, Kip Stallcop, Danielle Fawaz, Jules Kendrick, Sara Dinoto, Alina Labizon. Carol Stringer Adado, Jonathan Gans and D.J. Fox submitted by Bankers.

~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION - 1

SCHROETER GOLDMARK & BENDER

810 Third Avenue • Suite 500 • Seattle, WA 98104
Phone (206) 622-8000 • Fax (206) 682-2305

ORIGINAL

FINDINGS OF FACT

1. Plaintiffs Christine David and Rodney Clure seek certification pursuant to Civil Rule 23(a) and (b)(3) of a class of agents who sold insurance policies in the State of Washington for defendant Bankers Life and Casualty Company ("Bankers") between June 16, 2008 and December 2, 2013, the date of the Court's Memorandum Decision Granting Plaintiffs' Motion for Class Certification. These agents worked out of two branch offices (Bellevue and Tacoma/University Place) and four satellite offices (Bellingham, Walla Walla, Spokane, and Vancouver). Co-defendant Albert Hawks was the ~~regional and/or branch~~ *Sales manager for the Bellevue office and regional manager* for three ~~of these~~ offices (Bellevue, Bellingham, and Walla Walla) for ~~part of the~~ *proposed class period. at least June 2008 to July 2011.*

2. Bankers labeled plaintiffs and the putative class of agents "independent contractors." Plaintiffs allege they and the other agents were employees under the Washington Minimum Wage Act, RCW 49.46, *et seq.* ("MWA"), and were denied its protections of minimum wage and overtime pay by virtue of their classification as independent contractors.

3. The "class list" produced by Bankers to plaintiffs in March 2013 shows that approximately 1,156 agents had worked for the company in Washington between June 16, 2008 and the date of that list. Berger Decl. ¶6.

4. Plaintiffs have proffered substantial evidence that Bankers followed common policies and practices which applied to the employment classification and working conditions of all agents in Washington during the proposed class period.

5. All agents signed the same contract with Bankers, and all agents were classified as independent contractors in accordance with that contract and company policy. Berger Decl.

1 Ex. 17 (Agent Contract). All agents were paid under the same commission schedule, which was
 2 subject to unilateral change by Bankers. Berger Decl. Ex. 15 (Commission Schedule).

3 6. When an agent left Bankers Life, the policyholders served by that agent remained
 4 the client of Bankers, not of the agent. In other words, agents did not have their own "book of
 5 business."²

6 7. The proposed class members were "captive" agents.³ Bankers controlled the
 7 products that agents could sell and prohibited agents from selling the products of competitor
 8 insurers.⁴

9 8. Agents worked out of Bankers' offices or out of their home offices; there is no
 10 evidence in the record that any leased commercial space. The form of business card proscribed
 11 by Bankers also required agents to list the Bankers office as their business address. Berger Decl.
 12 Ex. 39 (Field Compliance Alert), at BL 2758.

13 9. Bankers' offices had work and meeting schedules that agents were expected to
 14 follow, and agents could be disciplined for failing to comply.⁵

15 10. Bankers required all agents to go through the same New Agent Success and
 16 Winners Edge training programs.⁶

17
 18
 19
 20
 21 ² Layton Decl. ¶15; Mitchell Decl. ¶10; Cummings Decl. ¶10; Berger Decl. Ex. 44 ("Conservation Procedure"), at
 22 BL 541 (describing that Agent does not "own" policyholder household, and servicing can be reassigned by Sales
 23 Manager); Berger Decl. Ex. 45 (Complaint in lawsuit filed by Bankers against former agents for, *inter alia*,
 soliciting customers away from the company).

24 ³ Cummings Decl. ¶15; David Decl. ¶8; McCormick Decl. ¶3; Berger Decl. Ex. 42.

25 ⁴ Second Layton Decl. ¶¶3-8; Second Cummings Decl. ¶¶3-6.

26 ⁵ Berger Decl. Ex. 3 (Office Schedules), Ex. 16 ("Seattle Steps for Success"); Blankenship Decl. ¶¶5-6; Layton Decl.
 ¶3; Keppler Decl. ¶2; Neil Decl. ¶7; Boles Decl. ¶4; McCormick Decl. ¶6; Mitchell Decl., ¶¶ 2,6; Francisco Decl.
 ¶4; Crowner Decl. ¶6; Clure Decl. ¶¶ 8, 10; Hendry Decl. ¶7; Gaynes Decl. ¶9; Bowie Decl. ¶5. *See also* Carter
 Decl. ¶7 (Bankers declarant, acknowledging written schedule agents were encouraged to follow); Dean Decl.
 ¶8 (same); Stallcop Decl. ¶9 (same).

11. Bankers controlled distribution of sales “leads,”⁷ provided standard telephone scripts and required approval of any different scripts,⁸ imposed restrictions on and required corporate approval of other advertising and marketing, including presentation materials and use of social media,⁹ and expected completion of certain forms, including a standardized “Fact Finder” during and following sales calls.¹⁰

12. Bankers also set targets for agents regarding the number of prospecting calls and in-person appointments they should make,¹¹ and Bankers’ managers monitored agents’ compliance with these expectations.¹²

13. Bankers expected agents to keep in daily contact with their managers. Berger Decl. Ex. 16 (“Seattle Steps for Success”).

14. Bankers also warned agents when they failed to return client calls within 24 hours,¹³ and expected agents to deliver policies in person to customers within a set period of time after the policies were issued.¹⁴

⁶ Berger Decl. Ex. 4 (“Welcome New Agent” letter), Ex. 7 (Bankers Life Branch Sales Manager [“BSM”] Manual), at BL 981-82; Glassburn Decl. ¶4; Mitchell Decl. ¶4; Clure Decl. ¶5; David Decl. ¶¶6, 11; Layton Decl. ¶8 (describing mandatory new agent training schedule).

⁷ Cummings Decl. ¶8; David Decl. ¶10; Boles Decl. ¶6; Francisco Decl. ¶7; Glassburn Decl. ¶3; Layton Decl. ¶10, 11; Gaynes Decl. ¶6.

⁸ Cummings Decl. ¶4; McCormick Decl. ¶5; Berryhill Decl. ¶ 15; Carter Decl. ¶ 18; Berger Decl. Ex. 7 (BSM Manual), at BL 983, Ex. 23 (Telephone Prospecting Training), at BL 1872 (instructing Agents, “do not stray from the script in any way”); Second Berger Decl. ¶¶4-5 (submitting and quoting training video).

⁹ Bowie Decl. ¶6; Crouner Decl. ¶8; Hoff Decl. ¶ 8; *see also* Berger Decl. Ex. 7 (BSM Manual), at BL 982-86, Ex. 17 (Agent Contract), at BL 10, Ex. 25 (Agent Information and Procedure [“Agent”] Manual), at BL 710, Ex. 33 (Telemarketing Guidelines), Ex. 34 (Field Compliance Alert), Ex. 35 (Field Compliance Alert), Ex. 36 (Agent Compliance Guidelines) (prohibiting websites and restricting use of social media).

¹⁰ Berger Decl. Ex. 7 (BSM Manual), at BL 985-86, Ex. 20 (New Agent Success Training – Fact Finding), at BL 1775.

¹¹ Berger Decl. Ex. 12 (New Agent Success Workshop - Prospecting), Ex. 16 (“Seattle Steps for Success”); Keppler Decl. ¶5; Layton Decl. ¶8; David Decl. ¶3; Cummins Decl. ¶¶4, 6.

¹² Boles Decl. ¶5; Cummings Decl. ¶6; Neil Decl. ¶7; Layton Decl. ¶8; David Decl. ¶3.

¹³ Second Berger Decl. ¶6 & Ex. 4 (written warning).

¹⁴ Cummings ¶4; Gaynes ¶7. Ex. 7 (BSM Manual), at BL 989; Ex. 25 (Agent Manual), at BL 764.

Bankers

15. A number of Bankers' declarants acknowledge the control that ~~branch managers,~~
~~specifically Mr. Hawks,~~ could and did exercise over agents' production measures, hours, and
schedules.¹⁵

16. Bankers did not require agents to have any prior experience in sales or insurance.
Layton Decl. ¶5; Cummings Decl. ¶11.

17. All agents generally incurred the same types of expenses and made the same
types of investments for their work, including licensing fees, laptops, cell phones, vehicles,
automobile insurance, gasoline, and office supplies. Glassburn Decl. ¶5; Graf Decl. ¶5.

18. Although many agents did not last more than a few months on the job, they were
recruited with the promise of a long-term career and were held out to the public as "career"
agents.¹⁶ And there appears to be no dispute that the work performed by the agents was an
integral and permanent part of Bankers' insurance business.

CONCLUSIONS OF LAW

1. Washington law favors resolution of cases through class actions, when
appropriate. The requirements of CR 23 are liberally construed toward this end. *Nelson v.*
Appleway Chevrolet, Inc., 160 Wash.2d 173, 157 P.3d 847 (2007). Often noted in favor of
allowing certification is the "state policy favoring aggregation of small claims for purposes
of efficiency, deterrence, and access to justice." *Scott v. Cingular Wireless*, 160 Wash.2d
843, 851-52, 856-57, 161 P.3d 1000 (2007). Because a class is always subject to a later

¹⁵ Fawaz Decl. ¶¶6-7; Kendrick Decl. ¶¶8-9; Dinoto Decl. ¶8; Labizon Decl. ¶¶7-8; Adado Decl. ¶5; Gans Decl.
¶¶8,10,11; Fox Decl. ¶9.

¹⁶ Berger Decl. Ex. 4 ("Welcome New Agent" letter), Ex. 42 Inter-Office Correspondence to Albert Hawks from
Christine David), Ex. 48 (Program Introduction Instructor Guide), Ex. 49 (Bankers Life Policy brochure), at BL
3171, Ex. 50 (Bankers Life Policy brochure), at BL 3178, Ex. 51 (Agent Development Track); Berger Decl. ¶8 &
Ex. 5 (quoting and submitting NASv training video); Mitchell Decl. ¶7; McCormick ¶4, Layton Decl. ¶6; Huggins
Decl. ¶2; Graf Decl. ¶6; David Decl. ¶7; Crowner Decl. ¶5.

1 decertification, trial courts should err in favor of certification. *Moeller v. Farmers Insurance*
 2 *Co. of Wash.*, 155 Wash.App. 133, 148 (2010), *aff'd*, 173 Wash.2d 264 (2011). However, the
 3 trial court must conduct a rigorous analysis of each of the CR 23 requirements to determine
 4 whether a class action is appropriate in any particular case. *Miller v. Farmer Bros. Co.*, 115
 5 Wash.App. 815, 820, 64 P.3d 49 (2003).

6
 7 2. In undertaking this review, the Court should not decide the merits of the case.
 8 However, it is important for the Court to assess class certification in light of the substantive
 9 law underlying plaintiffs' claims in order to determine whether the CR 23 requirements of
 10 commonality and predominance are met.

11 3. Here, the Washington Supreme Court has settled the question of the test to be
 12 applied under the MWA for determining whether workers are employees or independent
 13 contractors. In *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wash.2d 851, 281 P.3d
 14 289 (2012), the Court adopted the "economic dependence" test, which is more liberal and
 15 provides broader coverage of workers under the MWA than the "right to control" test used in
 16 some other jurisdictions.

17
 18 4. The central question under the "economic dependence" test is whether the
 19 worker is economically dependent upon the alleged employer or is instead in business for
 20 himself or herself. *Anfinson*, 174 Wash.2d at 871. Relevant factors include:

- 21
 22 (1) The degree of control exercised by the alleged employer;
 23 (2) The extent of the relative investments of the worker and the alleged
 24 employer;
 25 (3) The degree to which the worker's opportunity for profit or loss is determined
 26 by the alleged employer;

1 (4) The skill and initiative required in performing the job; and

2 (5) The permanency of the relationship.

3 *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008); *Anfinson*, 174 Wash.2d
4 at 869.¹⁷

5 5. These factors are not exclusive, and the determination must be made based
6 upon the circumstances of the whole activity. *Anfinson*, 174 Wash.2d at 870-71. Regarding
7 the degree of control factor, “[c]ontrol is only significant when it shows an individual exerts
8 such control over a meaningful part of the business that she stands as a separate economic
9 entity.” *Hopkins*, 545 F.3d at 343.

10 6. With respect to class certification under CR 23, the Court must first determine
11 whether the class is so numerous that joinder is impractical. CR 23(a)(1). There is a presumption
12 that joinder is impractical when the class numbers 40 or more. *Pierce v. Novastar*, 238 F.R.D.
13 624, 630 (W.D. Wash. 2006); *see also Miller v. Farmer Bros. Co.*, 115 Wn. App. at 821-22. As
14 noted above, there are more than 1,000 agents in the proposed class. Joinder of this many
15 potential class members is impractical, and the numerosity requirement is satisfied.

16 7. The commonality requirement of CR 23(a)(2) is satisfied if the claims of the
17 putative class members arises out of a common course of conduct or a common nucleus of
18 operative facts in relation to all class members. *Pellino v. Brink's Inc.*, 164 Wash.App. 668, 683,
19 267 P.3d 383 (2011). The predominance requirement of CR 23(b)(3) is met where the common
20 questions of law or fact predominate over questions affecting only individual class members.
21 *Pellino*, 164 Wash.App. at 683 n.5. The analysis of predominance under CR 23(b)(3) is
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23
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26 ¹⁷ The *Anfinson* Court also cited *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979), which listed a sixth factor: “whether the service rendered is an integral part of the alleged employer’s business.”

1 “somewhat more stringent than the CR 23(a)(2) commonality but it involves a similar
2 inquiry.” *Miller v. Farmer Bros. Co.*, 115 Wn. App. at 825.

3 8. Here, common questions of fact and law predominate. As noted in the Findings
4 of Fact above, all agents were classified by Bankers as independent contractors, signed the same
5 Agent Contract and were paid according to the same commission schedule, which was controlled
6 by Bankers. Bankers exerted a substantial degree of control over what products the agents could
7 sell, as well as their training, prospecting, marketing, sales, and customer service methods.
8 Bankers maintained office schedules and productivity measures that agents were expected to
9 meet. When agents left Bankers, they did not take their customers with them, and agents did not
10 establish their own commercial offices. Thus, there are significant common questions regarding
11 the degree of control exercised by Bankers and the degree to which the agents’ opportunity for
12 profit or loss was determined by Bankers, two of the factors in the *Anfinson* test.
13

14 9. In addition, there are numerous and predominant common questions of law
15 and fact with respect to the other *Anfinson* factors, including whether any specialized skills
16 were needed by agents to perform the job, the permanence of the working relationship, the
17 relative investments of the agents and Bankers, and the centrality of the work to Bankers’
18 business. Indeed, there appears to be little dispute that many of the facts applicable to these
19 elements of the *Anfinson* test are common across the proposed class members, even though
20 the parties may disagree about the conclusions to be drawn from those facts.
21

22 10. Bankers points out differences among agents in the application of its policies
23 regarding outside employment, work hours, training, use of telephone scripts and monitoring of
24 sales practices, use of standard marketing products, and the like. Bankers argues that such
25 variation in working conditions among the agents precludes a finding that common issues
26

1 predominate. However, some variation in work experience is expected in an MWA claim, and a
2 narrow interpretation of the predominance requirement “would contravene the clear policy in this
3 state that CR 23 should be read liberally in the interest of judicial economy.” *Miller v. Farmer*
4 *Bros. Co.*, 115 Wash.App. at 827.

5
6 11. The pivotal issue is whether a trier of fact – despite this variation among
7 agents’ freedom from company policies – could still find economic dependence, the test of
8 employee status under *Anfinson*. The Court concludes that a trier of fact could do so. It was
9 Bankers, not the agents, who determined whether an agent would be exempt from standard
10 company policies. Whether, considering all the circumstances, the agents were or were not in
11 business for themselves is a question that can be answered by the finder of fact on a classwide
12 basis.

13
14 12. Defendants also contend that the agents were exempt from the MWA as outside
15 salespersons. This contention does not defeat class certification. There are common questions of
16 fact, though disputed, whether agents were free to regulate their own work hours, which is a
17 critical element of the outside sales exemption. *See* WAC 296-128-540; Department of Labor
18 and Industries Administrative Polic ES.A.9.7 (June 4, 2005).

19
20 13. Representative claims are typical under CR 23(a)(3) if they are reasonably
21 coextensive with those of absent class members. Typicality is satisfied if the claim arises
22 from the same event or practice or course of conduct that gives rise to the claims of other
23 class members, and if the representatives’ claims are based on the same legal theory. *Pellino*,
24 164 Wash. App. at 684.

25
26 14. It is undisputed that plaintiffs Christine David and Rod Clure worked as
agents for Bankers and, like all other members of the putative class, were classified by

1 Bankers as independent contractors. They allege that they were economically dependent on
2 Bankers and were subject to the same company policies broadly applicable to the class
3 discussed above. *See* David Decl.; Clure Decl. Their claims that they were not paid
4 minimum wages or overtime under the MWA are the same as the claims asserted on behalf
5 of all class members. Bankers has not identified any defenses uniquely applicable to these
6 plaintiffs. Therefore, typicality is satisfied in this case.
7

8 15. CR 23(a)(4) also requires that the named plaintiffs will adequately represent the
9 class. Courts generally consider two elements in determining whether adequacy of representation
10 is met: (1) there must be no adversity of interest between the class representative and other class
11 members; and (2) the attorneys for the class representative must be qualified to conduct the
12 proposed litigation. *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982); *see also*
13 *DeFurnis v. Odegaard*, 84 Wash.2d 617, 622, 529 P.2d 438 (1974). Here, Bankers has identified
14 no adversity of interest between the plaintiffs and the proposed class, and has not challenged the
15 adequacy of plaintiffs' counsel. The Court also finds that plaintiffs' counsel is adequate, having
16 represented numerous certified classes in litigation under the MWA and other Washington wage
17 and hour laws in the past. *See* Berger Decl. ¶¶2-5.
18

19 16. The only challenge raised by Bankers to the adequacy of the proposed class
20 representatives concerns Ms. David's current employment in China. However, Ms. David has
21 testified that she will continue to be available to consult with class counsel even while employed
22 in China, and that she will be present in the United States during the scheduled trial of this
23 matter. David Dep. Tr. 35:5-24. Her situation is distinguishable from that of the proposed class
24 representative in *Arabian v. Sony Electronics, Inc.*, 2007 WL 627977, *6 (S.D. Cal. 2007),
25 cited by Bankers, who refused to attend trial in the United States. Finally, defendants offered no
26

1 challenge to the adequacy of Mr. Clure, and the CR 23(a)(4) requirement is satisfied as long as
 2 one of the proposed representatives is adequate. For these reasons, the Court concludes that CR
 3 23(a)(4) is satisfied here.

4 17. The superiority prong of CR 23(b)(3) focuses on "a comparison of available
 5 alternatives." *Sitton v. State Farm Mutual Auto. Ins. Co.*, 116 Wash. App. 245, 256, 63 P.3d
 6 198 (2003). A class action for the claims in this case is superior to the alternatives of
 7 individual lawsuits or joined plaintiffs. Alternatives would pose unnecessary costs to the
 8 judicial system with multiple lawsuits concerning the same legal issue and kinds of evidence
 9 concerning agents' economic dependence on Bankers. In addition to judicial efficiency, class
 10 treatment of these claims promotes access to justice because litigation costs are prohibitive
 11 for most individuals, and some class members may be deterred from filing suit in their own
 12 names due to their ongoing work relationship with Bankers. For these reasons, the Court
 13 concludes that a class action "is superior to other available methods for the fair and efficient
 14 adjudication of the controversy." CR 23(b)(3).

15 18. ~~Notwithstanding the foregoing,~~ the Court concludes that the CR 23
 16 requirements are not met with respect to defendant Albert Hawks. Plaintiffs seek to certify a
 17 statewide class action, but Hawks did not manage three of Bankers' six offices. He had no
 18 relationship to agents working out of those offices, and those agents could not have been
 19 economically dependent on him. Therefore, the requirements of commonality, ^{adequacy} typicality, and
 20 predominance are not met with respect to Mr. Hawks.

21 ORDER

22 In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court
 23 hereby ORDERS as follows:

1 1. Plaintiffs' motion for class certification is GRANTED as to defendant
2 Bankers Life and Casualty Company. The class is defined as:

3 All individuals who worked as agents for Bankers Life and Casualty
4 Company in the State of Washington at any time between June 16, 2008 and
5 December 2, 2013 and who were classified as independent contractors.

6 2. Plaintiffs' motion for class certification is DENIED as to defendant Albert
7 Hawks.

8 3. The parties shall confer and attempt to agree upon a Notice to Class Members
9 ("Notice") no later than ^{Feb.} ~~January~~ 3, 2014 [10 calendar days after the date of this Order].

10 If no agreement can be reached, each party shall submit to the Court a proposed Notice no
11 later than February 9, 2014 [7 calendar days after date stated in previous sentence];

12 4. After a Notice is approved, defendants' counsel shall provide to Class
13 Counsel, within ten (10) business days of the date of such Order, a complete and corrected
14 list of the putative class members with their last known addresses, telephone numbers and
15 social security numbers (such numbers shall only be used to identify correct addresses if
16 necessary). The social security numbers shall be kept confidential in conformity with the
17 Protective Order entered in this matter;

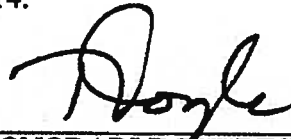
18 5. Class members shall have thirty (30) days from the date of the Notice within
19 which to return their exclusion requests advising counsel of their desire to opt-out of the
20 case;
21

22 6. Any class member who does not request exclusion may enter an appearance
23 through counsel; and
24

25 7. In the event any Notice is returned undeliverable, Class Counsel shall use
26 their best efforts to obtain corrected addresses. If corrected addresses are obtained, Class

1 Counsel shall re-mail the Notice promptly to the affected individuals, with exception that the
2 deadline for returning the exclusion forms shall be at least thirty (30) days after the date of
3 mailing.

4 DATED this 22 day of January, 2014.

5
6 

7 HONORABLE THERESA DOYLE

8 Presented by:

9 SCHROETER GOLDMARK & BENDER


10 
11
12 Adam J. Berger, WSBA #20714
13 Lindsay L. Halm, WSBA #37141
14 Counsel for Plaintiffs/Class Counsel

EXHIBIT D

INTERROGATORIES

INTERROGATORY NO. 2: State the amount of damages sought by the Class in this case, and describe in detail how that amount is calculated.

RESPONSE TO INTERROGATORY NO. 1:

Plaintiffs are in the process of calculating these damages, which will be based on the average hours worked by Class Members during the Class Period and their income for the Class Period as reflected in the 1099s produced by Defendant. Back pay for overtime hours will be calculated according to the stand methodology described in RCW 49.46.130(1), Department of Labor and Industries Administrative Policy ES.A.8.2, and *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 344-47, 279 P.3d 972 (Div. I 2012). For weeks in which Class Members had no income or income less than the minimum wage per hour worked, Plaintiffs are also claiming back pay equal to the difference between earnings actually paid and the minimum wage. Plaintiffs will also calculate and claim prejudgment interest on all back pay amounts at 12% simple per annum from the week in which wages were due through the date of trial. Discovery is ongoing and this answer will be supplemented.

FIRST SUPPLEMENTAL ANSWER (MAY 19, 2014):

Plaintiffs provide the following supplemental response with respect to calculation of classwide damages for the period June 16, 2008 through December 31, 2011.

Dr. Jeffrey Munson has calculated damages on a week-by-week basis for 478 class members who responded to an hours-worked survey based on their responses and 1099 data produced by defendant. His data, methodology, assumptions, and calculations have been

1 previously provided. His calculation of damages based on the low end of the survey response
2 ranges are \$2,176,583 for straight time damages (up to 40 hours in a week, where minimum
3 wage was not paid) and overtime damages of \$6,418,600. At the high end of the survey response
4 ranges, the straight time damages are \$2,228,658 and overtime damages are \$9,963,796. The
5 averages of the low and high values are \$2,202,620 and \$8,191,198 for straight time and
6 overtime respectively, or a total of \$10,393,818.

7
8 There are 375 class members during the relevant period who did not respond to the
9 survey but for whom 1099 data were provided. From the class list hire and termination dates,
10 these class members worked a total of 12,482 weeks during the relevant time period, compared
11 to 20,316 weeks for the 478 survey responders. They earned a total of \$7,137,059.61, compared
12 to a total of \$15,778,198.19 for the survey responders. Dividing total earnings by total weeks for
13 the two groups yields average weekly earnings of \$571.79 for the nonresponders and \$776.64 for
14 the survey responders, which in turn yields a ratio of .736. The average damages of \$10,393,818
15 for the survey responders, divided by their total eligible weeks (20,316), yields an average
16 damage per week of \$511.61. Multiplying this figure by the average weekly earnings ratio of
17 .736 for the nonresponders, then by the total eligible weeks of the nonresponders (12,482), yields
18 estimated damages of \$4,700,034 for this group of class members.

19
20 48 class members responded to the survey, but have no payroll data. These individuals
21 reported an overall non-weighted average of 48.44 hours worked per week, slightly lower than
22 the overall average of about 49.925 for the 478 survey responders with payroll data. According
23 to the class list, this group worked a total of 1,614 weeks during the relevant period. In addition,
24
25
26

1 there were 77 class members who did not respond to the survey and who are missing payroll
2 data, with total eligible weeks of 2,684 from the class list. Assuming that the absence of payroll
3 data reflects zero earnings during the relevant time period, damages can be conservatively
4 estimated using the average work hours reported by the 48 responders (48.44), the minimum
5 wage for 2009 and 2010 (\$8.55) and the total number of eligible weeks (4,298), yielding straight
6 time damages of \$1,469,916 (4,298 weeks * 40 hours/week * \$8.55/hour) and overtime damages
7 of \$465,228 (4,298 * 8.44 * \$8.55 * 1.5), or a total of \$1,835,144.
8

9 In sum, using the average of the low and high values calculated by Dr. Munson and the
10 above extrapolations, the total class damages for the June 16, 2008 through December 31, 2011
11 time period are estimated at \$16,928,996 (\$10,393,818 + \$4,700,034 + \$1,835,144).
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13 Discovery is ongoing and this answer may be supplemented.
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